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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 264

HOMER M. PRESTON,

Respondent,

vs.

AETNA LIFE INSURANCE COMPANY,

Petitioner.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

JAMES B. WESCOTT,
Attorney for Respondent.

MILLER, GORHAM, WESCOTT & ADAMS,
One North La Salle Street,
Chicago 2, Illinois.

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To the Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

IN ANSWER TO PETITIONER'S SUMMARY STATEMENT OF THE MATTER INVOLVED.

The summary statement of the matter involved as set forth in the petitioner's petition (Page 2) is inaccurate and, in some respects, untrue. The stipulation of fact referred to by the petitioner (Rec. Page 33) merely stipulates that the records of various hospitals, clinics and doctors, who attended Mr. Preston, might be admitted in evidence as being genuine without the necessity of proof thereof. These documents show that Mr. Preston suffered a coronary thrombosis in June of 1940, from which he recovered. Later, he had some difficulty with his right foot becoming numb and cold and, in 1943, he went to Johns Hopkins

Hospital and was examined by Dr. Hamman and treatment prescribed. The condition of the foot greatly improved and, prior to the accident sustained by him, the condition had become stabilized and dormant, if not completely cured. His condition has been diagnosed as arterio-sclerosis. Nowhere in the record is it shown that the respondent "had been suffering from either arterio-sclerosis or Buerger's Disease, a peripheral vascular disease in the right foot and leg and a recognized disease in the medical concept of the word" except in the affidavit of Dr. Theis in support of the motion for summary judgment. It must also be remembered that Dr. Theis never saw the respondent. There is no dispute of the fact that the respondent struck his foot against the corner of his desk and sustained a severe bruise on his toe. The motion for summary judgment in the District Court was supported by the affidavit of Dr. Theis and, in opposition thereto, the respondent filed two affidavits, one by Dr. Graham (Rec. Page 81), and the other by Dr. Jack (Rec. Page 83), both of whom had been attending physicians to Mr. Preston. The petitioner states (Page 3) that these affidavits in no way contradicted either the stipulated facts or the petitioner's medical affidavit, which is untrue. In Dr. Theis' affidavit (Rec. Page 30), he comes to the conclusion, from the examination of the records subject to the stipulation of fact, that the plaintiff was suffering from Buerger's Disease and that as a result thereof, he lost his leg. The affidavits of Dr. Graham and Dr. Jack state that Mr. Preston was suffering from a peripheral vascular disease which had become dormant and stabilized and that Mr. Preston would not have lost his leg had it not been for the accident which he suffered.

The petitioner also states (Page 4) that the ruling of the Court of Appeals has the effect of rewriting the contract of insurance. This is not the court's opinion. Since

the insuring and exclusion portions of the policy, partially quoted by the petitioner, relate to losses suffered through disease, and not through accident, we think the petitioner is endeavoring to rewrite the contract to provide that the insured must suffer an accident while in perfect health in order to be entitled to coverage. If the insurer meant that compensation would be paid under the policy only to persons who were perfect physical specimens at the time an accident is suffered, it could easily have been so stated in the policy. The Court of Appeals' opinion merely stated that it was error in the case to enter summary judgment on opinion evidence, and that a trial should be had to determine whether the plaintiff lost his leg as a result of the accident.

AS TO THE QUESTIONS PRESENTED BY PETITIONER.

The statement of Illinois law under paragraph 1 of the petition (Page 4) is wholly erroneous as there are numerous Illinois cases which allow recovery on an accident policy where the insured was suffering from a pre-existing disease; the whole question being whether or not the loss resulted from the accident.

Under point 2 (Petn. Page 4), we have never considered that *Erie* v. *Tompkins* required courts to follow decisions by "implication".

Under point 3 (Petn. Page 5), we do not think that it is necessary to examine every case decided by the appellate courts of the state to determine what the law of the state may be. When the court of last resort of the state has denied an appeal from an intermediate appellate court, of the last case directly in point which has been appealed to such court of last resort, such is determinative of the law of the state.

ARGUMENT.

I.

The Court of Appeals' Decision follows the law of the State of Illinois.

The petitioner in his argument under Points I A and I B (Petn. Pages 11, 12) relies upon *Ebbert* v. *Metropolitan Life Ins. Co.*, as decided by the Illinois Appellate Court, 289 Ill. App. 342, 7 N. E. 2nd 336 (1937), and the appeal therefrom to the Supreme Court of Illinois, 369 Ill. 306, 16 N. E. 2nd 749 (1938), in the contention that the rule of *Erie* v. *Tompkins*, 304 U. S. 64; 58 S. Ct. 817; 82 L. Ed. 1188 (1938), was not followed by the Court of Appeals. These cases were cited by the petitioner, both in the appellee's brief, as well as in its petition for rehearing before the Court of Appeals. It is apparent from the reading of the opinion of the Court of Appeals that the cases cited to it were read with care, and that the court took great pains in its opinion (Rec. Page 111, 112) to set forth the fact that the doctrine of *Erie* v. *Tompkins* was being meticulously followed.

The petitioner contends that the Court of Appeals did not follow "the implications" of the two *Ebbert* decisions and refers to the old Illinois case of *Crandall* v. *Continental Casualty Co.*, 179 Ill. App. 330 (1913), as the controlling principle and the guiding light of both the Appellate Court and the Supreme Court in this case. So far as we can find, in neither the Appellate Court case nor the Supreme Court case is the *Crandall* decision even mentioned. We thus feel that we must reiterate the statements made in our answer to the petition for rehearing in the Court of Appeals, that the petitioner has completely misapprehended

the decision of the Court of Appeals, as well as the law of the State of Illinois.

The Court of Appeals decided that it was error for the district judge to enter a *summary judgment* based on *opinion evidence,* and that the plaintiff was entitled to a trial upon the merits. This is the law of Illinois, for the Supreme Court of Illinois, in the case of *People* v. *Harvey,* 286 Ill. 593, at pages 604-605; 122 N. E. 138 at page 143, said:

> "There can be no question that the weight to be given the testimony of experts is to be determined by the jury. 'There is no rule of law which requires them to surrender their judgment or to give a controlling influence to the opinions of scientific witnesses' (The Conqueror, 166 U. S. 110; see to the same effect, 5 Ency. of Evidence, sec. 637, and cases there cited, 'Even if several competent experts concur in their opinion and no opposing expert evidence is offered, the jury are still bound to decide the issue upon their own fair judgment assisted by the statements of the experts. * * * Nevertheless, the testimony of an expert may not be arbitrarily rejected, but, like the evidence of every other witness, it is to be considered by the jurors, who are to accord to it influence, much or little, according as it appeals to their intelligent and impartial minds in view of all the facts and circumstances developed upon the trial and the common knowledge and experience of mankind, and, when such common knowledge utterly fails, the expert opinion may, of necessity, become controlling. * * * But the weight to be given to the opinions of witnesses testifying as experts is always a matter to be determined by the jury from all the circumstances appearing in evidence."

Attention is also invited to the decision of this Honorable Court in *Sartor* v. *Arkansas Natural Gas Corporation,* 321 U. S. 620; 88 L. Ed. 967 (1944), and cited by the

Court of Appeals (Rec. 114) which said, in referring to expert testimony (page 627 U. S., 972 L. Ed.):

> "The rule has been stated 'that if the court admits the testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony. The jury, even if such testimony be uncontradicted, may exercise their independent judgment.'"

In the *Ebbert* case, the Appellate Court's opinion centered entirely around the question of whether or not the insured died as a result of "accidental means". Ebbert had submitted to an operation for the removal of his tonsils and, while under the anesthetic, death occurred. The insured's widow sought recovery under the policy on the grounds that he had died by "accidental means". The court went to great lengths to carefully review the Illinois decisions as to what is "accidental means", citing from the Supreme Court case of *Christ* v. *Pacific Mutual Life Ins. Co.*, 312 Ill. 525; 144 N. E. 161, and, on page 355 quoting therefrom, as follows:

> "The court properly instructed them that the jumping off the platform was the means by which the injury, if any sustained, was caused; that the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground; that the term 'accidental' was used in the policy in its ordinary, popular sense, as meaning 'happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected'; that if a result is such as follows from ordinary means voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means.'

" 'The *Barry case* is a leading case, which is usually cited in cases on accident policies involving the question of what constitutes an accident. The language quoted was approved in *Higgins* v. *Midland Casualty Co.*, 281 Ill. 431, which quoted from *Bryant* v. *Continental Casualty Co.*, 107 Tex. 582, as follows: "The proper and true test in all instances of voluntary action is that defined in the *Barry case.* If in the act which precedes the injury, though an intentional act, something unforeseen, unexpected and unusual occurs which produces the injury, it is accidentally caused." ' "

The court also refers to *Burns* v. *Metropolitan Life Ins. Co.*, 283 Ill. App. 431, in which the insured, while suffering from vertigo, was killed as the result of a fall to the sidewalk from the window of the apartment in which she lived, and in which recovery was permitted under identical provisions of the policy. It will be noted that in this case the disease itself caused the accident which resulted in death.

It must also be remembered that the trial court heard the *Ebbert* case *without a jury.* When the Appellate Court case was appealed to the Supreme Court, only two points were made in the decision, both of which were with respect to the Illinois Civil Practice Act. The first point being that the Appellate Court, under the Practice Act (Ill. Rev. Stats. 1937, Chap. 110, par. 216), had the authority *where a jury has been waived* to reverse without remanding; the other point of the decision being that the Supreme Court, under the Civil Practice Act (Ill. Rev. Stats. 1937, Chap. 110, par. 213), is bound by the findings of fact of the Appellate Court. The court does not discuss the findings of fact in any manner whatsoever and the cases cited by it relate solely to the procedural question. The *Ebbert* case is completely out of point.

II.

The Court of Appeals adhered to the principle of Erie v. Tompkins.

The last case in the First Appellate District for Illinois from which leave to appeal was denied by the Supreme Court, 299 Ill. App. xvii, was *Rebenstorf* v. *Metropolitan Life Ins. Co.*, 299 Ill. App. 71, 19 N. E. 2nd 420. The *Rebenstorf* decision was also cited with approval by the Court of Appeals for this circuit in *Nelson* v. *Business Men's Assurance Co. of America*, 108 F. 2d 363 (1939) and *Lang* v. *Metropolitan Life Ins. Co.*, 115 F. 2d 621 (1940). We think that the Court of Appeals completely followed the doctrine of *Erie* v. *Tompkins* since it followed the last case in the Illinois Appellate Courts from which an appeal was denied by the Supreme Court, and also since, as stated in the opinion (Rec. Page 118), the weight of authority supports the rule of that case.

III.

The Court of Appeals is not rewriting the contract between the parties.

The petitioner, on page 15 of its petition, urges upon this Honorable Court that the Court of Appeals, by its decision, attempted to rewrite the contract between the parties. It must be remembered that the petitioner's policy issued to Mr. Preston was an accident policy, not a health policy. The insuring and exclusion clauses partially quoted by the petitioner so indicate. We do not believe it was the intention of the parties to the insurance contract to provide coverage only if the insured was a perfect, physical specimen at the time the accident occurs or, as so

aptly put by Judge Cardozo in *Silverstein* v. *Metropolitan Life Ins. Co.*, 254 N. Y. 81; 171 N. E. 914:

> "A policy of insurance is not accepted with the thought that its coverage is to be restricted to an Apollo or a Hercules."

If so, there would be few, if any, recoveries on accident policies.

The doctrine of "proximate cause" is advanced by the petitioner in its petition, not by the Court of Appeals. To borrow petitioner's language in "plain, ordinary and popular meaning", Mr. Preston had an accident and lost his leg. The Court of Appeals merely decided that it was error for the District Court to enter summary judgment against him, based on opinion evidence, and that the respondent was entitled to a trial on the merits of the case.

CONCLUSION.

This Honorable Court is respectfully requested to deny the petition for the writ of certiorari.

Respectfully submitted,

JAMES B. WESCOTT,
Attorney for Respondent.
MILLER, GORHAM, WESCOTT & ADAMS,
One North LaSalle Street
Chicago 2 Illinois